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SUBJECT: PRECAUTIONARY PRINCIPLE: SENTENCE FIRST, VERDICT
SECOND

¶1. (U) SUMMARY. At its quarterly meeting in Brussels March 31, the European Risk Forum focused its roundtable discussion on the precautionary principle, with Commission and European agency officials, private sector representatives, academics and others weighing in. The discussion, which was less a debate about the merits of the principle and more about its proper use, was highlighted by robust exchanges which led to general conclusions that the EU had gone far enough in its use of precaution, that benefits needed greater consideration in impact assessments, and that prudent caution need not lead to bans of products if other options are available and if there is not yet compelling evidence that demands drastic measures. Indeed, there was general agreement that excessive use of the precautionary principle should be avoided, lest it stifle innovation, but with health and environmental concerns paramount in the decision-making process. END SUMMARY.

Background

¶2. (U) The European Risk Forum (ERF) convened its first quarterly meeting of 2009 on March 31 in Brussels. ERF is a Brussels-based think tank well known to Mission and Washington risk managers and analysts as an objective promoter of high quality risk assessment and management, a vigorous interlocutor with EU institutions and officials, and a strong supporter of science and fact-based policy making.

¶3. (U) In addition to the precautionary principle, other items on the March 31 agenda included a review of ERF's 2009 work plan, a discussion of emerging trends in risk management at the EU level, and a presentation on risk communication. The signal event of the meeting, however, was the roundtable on the precautionary principle, the risk-focused principle used by EU regulators to guide their assessment and management of risk. While not a spirited debate per se, the conversation was quite robust, focused more on the proper uses of the principle in the guidance of crafting policy rather than whether or not a precautionary approach should be in the toolbox at all.

Definition

¶4. (U) Harrie van Dijk from the Dutch Health Council opened the roundtable and offered two definitions of the precautionary principle. He said the definition accepted in European jurisprudence is the following: where there is uncertainty as to the existence or extent of risks to human health or the environment, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent. To put

it more simply, said van Dijk, the precautionary principle is the anticipatory exercise of caution with a view to preventing something undesirable.

15. (U) Van Dijk suggested the principle was more a process than a decision rule, and said the key to applying it was to find balance between caution and progress. He cited cell phones as a good example: despite some evidence linking cell phone use to some cancers, the EU would never think to ban them unless a strong and irrefutable link was established. Risk managers will continue to monitor the situation, van Dijk said, in a cautionary, rather than a precautionary manner. But in general, he said, the ultimate challenge was to produce a fair distribution of cost and benefits across EU citizenry and future generations while ensuring that risks to health and environment never outweigh the benefits. He suggested the principle be regarded as a strategy for dealing with uncertainties, and, as such, should be applied to all health related issues and to issues with considerable uncertainty. Returning to the need for balance, he warned against the undesirable consequences of both excessive and insufficient caution and suggested that banning and/or exclusion of products or substances should be seen as last resorts.

Jurisprudence

16. (U) Alberto Alemanno, Associate Professor of Law at the Ecole des Hautes Etudes Commerciales (HEC) in Paris, presented the first of two views on jurisprudence and the principle. Alemanno said the BSE crisis of the 90s shaped

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earlier decisions regarding the principle in European Community courts, prompting the courts to err on the side of caution in cases regarding risk management and awareness. A key ruling issued in 2002 by the EU Court of First Instance in the case of Pfizer-Alpharma reinforced the EU's legal framework for applying the principle, reaffirming that precautionary action can be justified in appropriate circumstances and clearly defined the conditions triggering its application. He said that as agencies such as the European Food Safety Agency (EFSA) and the European Chemicals Agency (ECHA) have been established, the Commission has taken the lead in risk; nonetheless, courts have also ruled there is clearly no supremacy of "Euro science" over national science and when there are uncertainties in scientific research, member states can "decide what degree of protection . . . they intend to ensure." But Alemanno stressed that courts have also ruled that the principle of proportionality must be applied as well, and that a member state measure will be considered disproportionate "if it is manifestly inappropriate or when it may be shown that other, less onerous measures" are available.

17. (U) Commenting on a study of the principle and EU case law, Michael Rogers, from the International Council of Amino Acid Science, said the results are mixed in terms of how and when the principle should be applied. According to his study, 140 cases involving the principle were heard from 1995-2008, half of which the study deemed significant. Those decisions said that the principle should be non-discriminatory, applied consistently, take into account both costs and benefits, and should be subject to review in the face of new evidence. On disproportionality, he said, one case was decided in favor of member state competence, another in support of the Commission's lead. But in a 1999 case, the European Court of Justice (ECJ) ruled that a member state was not obliged to give its consent to allowing the sales or cultivation of genetically modified organism (GMO) products if it had new information regarding risk. On the other hand, he said, a European court has never asked a member state to go back and do more risk assessments before applying the principle. Rogers said the Commission should issue a new Communication regarding the principle, one that

might encourage alternate approaches to risk management that fall short of keeping products from the market. Regardless, Rogers thought the major consequence of strictly applying the precautionary principle - sentence first, verdict second - was vulnerable to modification in the courts in the long run, adding that an expected high number of cases due to the new REACH regulation may well provide such a test.

18. (U) The roundtable concluded with a presentation from Bjorn Hansen, DG Environment. (Note: Hansen is the new chair of the OECD's Working Party on Manufactured Nanomaterials and is former director of the European Chemicals Agency. End Note) Hansen cited two case studies, both involving flame retardants, as examples of how the principle, correctly, was and was not invoked. In one study, the EU had conducted risk assessments that suggested five to ten years were needed to generate enough data to accurately assess the safety of the chemicals. Based on the risk assessments and invoking the precautionary principle, the EU decided to ban at once and not wait for further evidence. On the other hand, said Hansen, was the risk assessment for another flame retardant, which could not conclude that there were any risks to health, but suggested another 10 years would be needed to prove long-term safety. In this case, said Hansen, the Commission did not invoke the principle, and the product was approved for sale. He said, on balance, the EU has not gone too far in its invocation of the principle, but has gone far enough.

Comment

19. (U) While not a debate per se, the roundtable illustrated the varied perspectives on the precautionary principle within Europe. It is clear that while some EU regulators strive to find a balance between caution and precaution, legislation such as REACH and other similar measures (the Toy Safety Directive, the Novel Foods Directive) that are firmly grounded in the precautionary principle may provide future judicial grist to modify use of the principle and ensure its proportionate application. Nonetheless, the precautionary principle is here in Europe to stay, and with hot-button issues such as GMOs, nanotechnology, and cloning still under

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discussion and vulnerable to guilt by association, continued USG efforts to encourage a process in which evidence-based science leads to a fair verdict on risk before a sentence is pronounced remain vital.

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